IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 18, 2002 Session

STATE OF TENNESSEE v. HERMAN MAJORS, JR.

Appeal from the Circuit Court for Montgomery County
No. 41078 John H. Gasaway, III, Judge

No. M2001-02143-CCA-R3-CD - Filed August 29, 2002

The Appellant, Herman Majors, Jr.,was indicted for attempted aggravated robbery based upon a theory of criminal responsibility for the conduct of another. Tenn. Code Ann. § 39-11-402(2). A Montgomery County jury found Majors guilty of the indicted offense, resulting in a twelve-year sentence as a persistent offender. In this appeal as of right, Majors argues that the trial court erred by failing to instruct the jury as to the lesser offense of facilitation of attempted aggravated robbery, Tennessee Code Annotated § 39-11-403 (1997). After a review of the record, we conclude that the trial court erred in not instructing the jury as to facilitation. Majors' conviction is reversed, and the case is remanded for a new trial.

Tenn. R. App. P. 3; Judgment of the Circuit Court Reversed; Remanded for a New Trial.

DAVID G. HAYES, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Michael J. Love, Cartwright & Love, Clarksville, Tennessee, for the Appellant, Herman Majors, Jr.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Kim R. Helper, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and C. Daniel Brollier, Jr., Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

On November 12, 1997, Regina Young, a cashier at the Amoco Station on Old Ashland City Road in Clarksville, was cleaning shelves at the store in preparation for an upcoming inspection. Young was able to see customers as they came into the store by looking into a mirror on the wall. At approximately eight o'clock in the evening, Young saw Will Stacker enter the store and leave abruptly. Young, realizing that Stacker could not see her, stood up and walked to the front of the

store. Stacker, wearing a blue bandana covering his face, re-entered the store and demanded money. He had his "right hand tucked up underneath – into his pocket. It looked like he had a gun." Young proceeded to the cash register and began to get the money out. At this time, Stacker "did something with his right hand, and [Young] saw this wooden handle pop out." Thereafter, Young, believing Stacker did not have a gun, refused to give him any money, and he left the store. Stacker got into a black pickup truck driven by the Appellant, who gestured to Stacker as if to say, "What's going on?" As Stacker was leaving the store, another customer came into the store, and Young asked the customer to get the license plate number of the truck.

During the course of the attempted robbery, the Appellant was sitting in the truck with his hands on the steering wheel looking into the store. After the failed robbery, Stacker entered the truck and the Appellant drove hurriedly out of the parking lot. After a high speed police chase, the Appellant and Stacker were apprehended. The Appellant was transported by Officer Eddie Chancellor to the Amoco station for a show-up identification. During this time, the Appellant stated to Officer Chancellor that if he "could help him out of this particular little bit of trouble that he had got himself in that he could confess to . . . some shit that you all don't even know about." The Appellant also said that "he thought [the police] could have done a better job pursuing him." Officer Daryn Lovelace was also in the car and recalled that the Appellant said, "he had done what he had done" to support a drug habit. Once at the police station, a blue bandana was removed from the Appellant's neck.

On September 7, 1999, a Montgomery County grand jury indicted the Appellant for attempted aggravated robbery and evading arrest. The Appellant pled guilty to evading arrest. On October 26, 1999, after a trial by jury, the Appellant was found guilty of attempted aggravated robbery. This timely appeal followed.

ANALYSIS

The Appellant contends that the trial court erred in failing to instruct the jury on the offense of facilitation of attempted aggravated robbery as a lesser-included offense of attempted aggravated robbery. As previously noted, the Appellant's prosecution was based upon the theory that he was criminally responsible for the attempted robbery by aiding or attempting to aid Stacker in the commission of the offense. Tenn. Code Ann. § 39-11-402(2) (1997). Specifically, he argues that the evidence presented at trial could have supported a finding that he "knowingly furnishe[d] substantial assistance" in the attempted robbery of the Amoco station but lacked the intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense. Tenn. Code Ann. § 39-11-403(a) (1997). The State responds that an instruction on facilitation was unwarranted because, "based upon the facts of this particular case and defendant's theory, the evidence did not support an instruction on facilitation."

At trial, the Appellant did not request an instruction on the lesser offense. However, irrespective of any request for a lesser-included jury instruction, Tennessee Code Annotated § 40-18-110(a), as in effect at the time of the Appellant's trial, provided:

> It is the duty of all judges charging juries in cases of criminal prosecutions for any felony where two (2) or more grades or classes of offense may be included in the indictment, to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so.

Tenn. Code Ann. § 40-18-110(a) (1997). An offense is a lesser-included offense if:

> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
>
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing:
>
> > (1) a different mental state indicating a lesser kind of culpability; and/or
> >
> > (2) a less serious harm or risk of harm to the same person, property or public interest; or
>
> (c) it consists of
>
> > (1) facilitation of the offense charged . . . ; or
> >
> > (2) an attempt to commit the offense charged . . . ; or
> >
> > (3) solicitation to commit the offense charged.

State v. Burns, 6 S.W.3d 453, 466-67 (Tenn.1999).[1] Whether a lesser-included offense must be charged in a jury instruction is a two-part inquiry. *Id.* at 467. First, the trial court must apply the *Burns* test to determine whether a particular lesser offense is included in the greater charged offense. *Id.* If a lesser offense is not included in the offense charged, then an instruction should not be given, regardless of whether evidence supports it. *Id.* If, however, the trial court concludes that a lesser offense is included in the charged offense, the question remains whether the evidence justifies a jury instruction on such lesser offense. *Id.*

Aggravated robbery is defined in Tennessee Code Annotated § 39-13-402(a) as "robbery as defined in § 39-13-401: (1) Accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon; or (2) Where the victim suffers serious bodily injury." Tenn. Code Ann. § 39-13-402(a). Robbery is defined in Tennessee Code Annotated § 39-13-401(a) as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401(a)

[1] In fairness to the trial court, we note that this case was tried before the decision in *Burns* was released.

(1997). Additionally, "[a] person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony." Tenn. Code Ann. § 39-11-403(a).

Our supreme court has held that "virtually every time one is charged with a felony by way of criminal responsibility for the conduct of another, facilitation of the felony would be a lesser-included offense." *State v. Fowler*, 23 S.W.3d 285, 288 (Tenn. 2000); *see Burns*, 6 S.W.3d at 470. The Appellant was charged and tried under the theory of criminal responsibility for the conduct of Will Stacker, and we, therefore, hold that facilitation of attempted aggravated robbery is a lesser-included offense under part (c) of the *Burns* test. *See State v. Allen*, 69 S.W.3d 181, 187 (Tenn. 2002).

Next, we examine whether the evidence presented at trial justified a jury instruction on facilitation of attempted aggravated robbery. The following two-step analysis is required:

> First, the trial court must determine whether any evidence exists that reasonable minds could accept as to the lesser-included offense. In making this determination, the trial court must view the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser-included offense.

Burns, 6 S.W.3d at 469. Error in omitting a lesser-included offense instruction is not negated merely because the evidence also is sufficient to convict on the greater offense. *Allen*, 69 S.W.3d at 187 (citing *State v. Bowles*, 52 S.W.3d 69, 75 (Tenn. 2001)). The Appellant need not demonstrate a basis for acquittal on the greater offense to be entitled to an instruction on the lesser offense. *Id.* (citing *Bowles*, 522 S.W.3d at 69.) The trial court must provide an instruction on a lesser-included offense supported by the evidence even if such instruction is not consistent with the theory of the State or of the defense. The evidence, not the theories of the parties, controls whether an instruction is required. *Id.*

The proof, in the light most favorable to the existence of the lesser-included offense, reveals that the Appellant waited in a black pickup truck outside the Amoco station while Stacker went inside and attempted to rob the store clerk. When Stacker got inside the vehicle after the failed robbery, the Appellant motioned to Stacker as if to say, "What's going on?" Thereafter, the Appellant and Stacker fled the scene, and a high speed chase ensued. There was no direct evidence that the Appellant would have benefitted in the proceeds of the robbery. We hold that a jury could accept this evidence and find that the Appellant did not have the intent to rob the Amoco station clerk but knowingly furnished substantial assistance in the commission of the robbery. Therefore, the trial court erred by not charging facilitation of attempted aggravated robbery.

Having concluded that the trial court erred by failing to instruct the jury on facilitation of attempted aggravated robbery, our final inquiry is whether that error is harmless beyond a reasonable doubt. *Allen*, 69 S.W.3d at 189 (citing *State v. Ely*, 48 S.W.3d 710, 727 (Tenn. 2001)). An erroneous failure to give a lesser-included offense instruction will result in reversal unless a reviewing court concludes beyond a reasonable doubt that the error did not affect the outcome of the trial. *Id.* (citing *Bowles*, 52 S.W.3d at 77). The error may be harmless when the jury, by finding the Appellant guilty of the highest offense to the exclusion of the immediately lesser offense, necessarily rejected all other lesser-included offenses. *Id. (*citing *State v. Williams*, 977 S.W.2d 101, 106 (Tenn. 1998)).

However, we conclude that facilitation of a crime involves an entirely different analysis. *State v. Daniel Wade Wilson*, No. E2000-01885-CCA-R3-CD (Tenn. Crim. App. at Knoxville, Aug. 2, 2001), *perm. to appeal denied*, (Tenn. 2002). Facilitation addresses the Appellant's role as a facilitator rather than a principal actor. *Id.* The Appellant's theory was that he did not share Stacker's intent to rob the Amoco station but that he provided assistance to Stacker by fleeing from the scene. The intervening lesser offense, attempted robbery, charged by the trial court addressed the theory that the Appellant acted as a principal. The jury was not permitted to give consideration to a legally sufficient theory of liability proffered by the Appellant (*i.e.*, facilitation). *Id.* The issue of the Appellant's intent was contested. Evidence that the Appellant shared the intent of Stacker was controverted and not overwhelming. In light of the controverted evidence of the Appellant's intent, we are unable to conclude beyond a reasonable doubt that the jury, if given the opportunity, would not have convicted the Appellant of facilitation of attempted aggravated robbery. *See Allen*, 69 S.W.3d at 191. We, therefore, reverse the Appellant's conviction for attempted aggravated robbery and remand for a new trial.

CONCLUSION

We conclude, from our review of the evidence under the required analysis of *Burns*, that the trial court erred in failing to instruct the jury on the lesser-included offense of facilitation of attempted aggravated robbery. Accordingly, we reverse the judgment of conviction and remand for a new trial.

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DAVID G. HAYES, JUDGE